No. 89-40

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD DELMER BOYER,

Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the subjective beliefs of an individual contacted by the police have any bearing on whether the individual was seized within the meaning of the Fourth Amendment or evidence subsequently obtained is admissible as a fruit of the contact?

2. Whether a blurted out admission of culpability to a double murder by respondent as the police officer was leaving the room when respondent had previously invoked his *Miranda* rights constitutes an initiation of conversation within the meaning of *Edwards v. Arizona* (1981) 451 U.S. 477, and the plurality and dissenting opinions in *Oregon v. Bradshaw* (1983) 462 U.S. 1039?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court

of California issued on March 13, 1989, reversing the judgment in its entirety.[1]

OPINION BELOW

The opinion of the California Supreme Court (*People v. Boyer* (1989) 48 Cal.3d 247) appears as Appendix A of the petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on March 13, 1989. A timely petition for rehearing by petitioner was denied on May 22, 1989. This petition is filed within 60 days of that judgment and is therefore timely.

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1. The parties to the proceedings below were petitioner, the People of the State of California (plaintiff and respondent below), and respondent, Richard Delmer Boyer (defendant and appellant below).

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Four, Five, Six, and Fourteen; California Penal section 190.2.

STATEMENT OF THE CASE

Respondent was convicted in Orange County Superior Court of two counts of first degree murder (Pen. Code, §§ 187, 189), and two counts of robbery (Pen. Code, § 211). The jury sustained an allegation that respondent had used a deadly weapon, a knife in each of the offenses (Pen. Code, § 12022, subd. (b)). It also found as special circumstances under the 1978 death penalty law that respondent had been convicted of more than one murder in the proceeding (Pen. Code, § 190.2, subd. (a)(3)), and each of the murders was committed intentionally during

a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). The jury fixed the punishment at death.

The appeal was automatic. The California Supreme Court reversed the judgment in its entirety finding respondent's statements had been obtained in violation of his Fourth Amendment rights and *Miranda v. Arizona* (1966) 384 U.S. 436. (*People v. Boyer, supra*, 48 Cal.3d at pp. 255-256; Appen. pp. A-1-A-3.)

STATEMENT OF FACTS

A. The Crimes

On December 7, 1982, Francis and Eileen Harbitz, an elderly Fullerton, California, couple were robbed and stabbed to death in their home.

Respondent knew the victims' son. On several occasions he had helped around the house and owed them money. He had been at the victims' residence about four months

before the killings, but not thereafter. However, the week before the killings respondent called the victims' son several times. In one call he indicated he was struggling to survive financially. (*People v. Boyer, supra*, 48 Cal.3d at p. 256; Appen. pp. A-3-A-4.)

John Kennedy testified he and respondent went to the victims' residence. At respondent's direction Kennedy parked on a side street and waited while respondent crossed a yard and disappeared. Respondent was wearing a knife in a sheath. After 45 or 50 minutes, respondent returned carrying a towel. When a police or security car passed by, respondent used the towel to wipe off the rear window.

Respondent told Kennedy to drive off without attracting attention. Respondent had a blood spot on his knife. Respondent said he had been stabbed in the leg by

dope dealers. Respondent eventually threw two wallets out of the car and paid Kennedy some money he owed him. (*People v. Boyer, supra*, 48 Cal.3d at p. 257; Appen. pp. A-5-A-6.)

Respondent's girlfriend, Cynthia Cornwell, testified respondent had no money before December 7, 1982. That evening he returned home with a stab wound, but had some money.

On December 14, 1989, he told her he had done something that would make her mad at him. Later that evening Fullerton detectives arrived at the residence and asked respondent to accompany them to the station for an interview. Cornwell later gave police consent to search the residence. Before the police had arrived, she burned a light jacket respondent had worn on December 7. (*People v. Boyer, supra*, 48 Cal.3d at p. 257; Appen. pp. A-6-A-7.)

A search of the residence revealed pants stained with blood similar to that of the victims. A bloodstained knife was also seized from the residence. The stains on the knife were of human origin, but were too small to allow closer analysis.

While at the police station, respondent admitted killing the victims. He later showed the police where one of the wallets had been discarded. (*People v.Boyer, supra*, 48 Cal.3d at pp. 258-259; Appen. pp. A-8-A-13.)

Respondent presented evidence of extensive drug use and claimed to have been in a "fog" while in the house. He did not know how the victims had been killed. (*People v. Boyer, supra*, 48 Cal.3d at pp. 259-262; Appen. pp. A-13-A-20.)

In rebuttal the prosecution introduced a stipulated statement to the

following effect: "On December 15, 1982, the day after the taped statement, Fullerton Detectives Allred and Lewis again interviewed respondent. At that time, respondent said he remembered stabbing Mr. and Mrs. Harbitz more than once, but he could not say how many times. Defendant also admitted knowing before he left the Harbitzes' home that he had killed them, and he again expressed remorse." (*People v. Boyer*, *supra*, 48 Cal.3d at p. 262; Appen. pp. A-20-A-21.)

B. Circumstances Surrounding the Interrogation

At 5:30 p.m., on December 14, Detectives Allred and Lewis met at respondent's El Monte residence with Officers Scroggins and Fentress of the El Monte police force. Lewis had Scroggins and Fentress cover the rear of the house while he and Allred knocked on the front

door. It was understood respondent would be detained if he attempted to flee. Lewis told the other officers he lacked probable cause to arrest respondent and was seeking a voluntary interview with respondent. (*People v. Boyer, supra,* 48 Cal.3d at p. 263; Appen. pp. A-25-A-26.)

Lewis knocked on the front door and identified himself. Respondent went out the back door and was stopped by Scroggins and Fentress. Scroggins identified himself as a police officer, asked respondent to step into the driveway, and told him two gentlemen in front wanted to speak with him. The El Monte officers had commanded respondent to halt when he came out of the door. (*People v. Boyer, supra,* 48 Cal.3d at p. 263; Appen. pp. A-26-A-27.)

Lewis asked respondent if he would voluntarily come to the Fullerton police

station for an interview. Respondent agreed. He testified he did so because he thought he would have to go anyway and did not want to create a scene in front of Cornwell.

Respondent asked if he could go in and get a shirt before leaving with the officers. Lewis agreed, and the officers followed respondent inside. Lewis went into the house because he wanted to keep respondent in sight. (*People v. Boyer, supra*, 48 Cal.3d at p. 264; Appen. pp. A-23-A-28.)

Inside the house, Cornwell asked if she could accompany respondent to the station. Lewis said she could go, but she was unable to arrange child care. Lewis explained that respondent would be gone about three hours, including the one hour of interview time and two hours of travel.

Before entering the police car, respondent was frisked for weapons. Lewis

told respondent to "have a seat in the back," and respondent did so. Lewis and Allred got into the front seat. There was no cage between the front and rear. Respondent was not handcuffed and the car doors were not locked. During the one-hour drive from El Monte to Fullerton, Lewis told respondent they were investigating a homicide and would not take statements until they reached the station. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 264; Appen. pp. A-28-A-29.)

At the station, respondent was advised of his *Miranda* rights. After several minutes, respondent continued to protest his innocence. Lewis repeatedly proclaimed the police could prove respondent had committed the homicides and respondent was "gonna fall on this one." Lewis told respondent that he had evidence of which respondent was unaware and they could place him at the scene. He also had

said respondent's lies would not make the situation go away.

Respondent continued to deny his guilt while Lewis told him to show "damn conscience" and to help the police "understand" his actions. During this period respondent asked several times if he was under arrest. Lewis evaded the questions and continued the interrogation. Respondent made several equivocal remarks about wanting a lawyer. At 8:49 p.m., respondent indicated he did not want to talk further. Lewis ended the questioning. (*People v. Boyer, supra,* 48 Cal.3d at p. 265; Appen. pp. A-29-A-31.)

After leaving the room for a few moments, Lewis returned and asked respondent to consent to a search of the El Monte residence. Respondent agreed to the search only if Cornwell also gave

permission since it was her house. Cornwell eventually consented.

Lewis returned to the room and asked respondent if police could fingerprint him for elimination purposes. Respondent agreed, but asked again if he was under arrest. Lewis said he was not under arrest. Respondent did not recall the conversation. Respondent testified he was handcuffed during the trip to the jail, the officers denied it. (*People v. Boyer, supra*, 48 Cal.3d at pp. 265-266; Appen. pp. A-32-A-34.)

Thereafter, Cornwell called and spoke to respondent. She asked him if it was all right to consent. He told her it was her decision since it was her house and it was all right with him. Respondent told Cornwell he was being charged with two counts of murder. Lewis was shocked and surprised since respondent had not been

placed under arrest. (*People v. Boyer, supra*, 48 Cal.3d at p. 266; Appen. pp. A-34-A-35.)

When respondent completed the conversation, Lewis invited him back into the interrogation room to tell him a few things. Lewis said since respondent had asked for an attorney, he was not there to solicit any statements from him, but wanted him to understand a few things.

While respondent had been fingerprinted, the detectives had telephoned one of the victims' sons and obtained some additional information. Lewis then said he did not know whether respondent was involved and was telling the truth, but would check into the case further. (*People v. Boyer, supra*, at p. 266; Appen. pp. A-35-A-36.)

At this time, Lewis turned to leave the room intending to arrange transportation home for respondent. At

this point respondent shouted, "Hey, wait a minute. Come back here and sit down. You're right, I can't live with it. I did it. I didn't mean to do it. But I did it." (*People v. Boyer, supra*, 48 Cal.3d at p. 267; Appen. pp. A-36.)

Lewis reactivated the recorder and took a waiver of respondent's *Miranda* rights, during which respondent remarked he could not afford an attorney. Respondent then confessed. (*People v. Boyer, supra*, at p. 267; Appen. pp. A-36-A-37.)

Respondent was interviewed on December 15, 1982, and confessed again to the crimes. This confession was admitted at trial by stipulation of the parties. (*People v.Boyer, supra*, at p. 262; Appen. pp. A-20-A-21.)

C. Rulings of the California Supreme Court

1. The Supreme Court concluded respondent's statements were the fruit of an illegal arrest without a warrant or probable cause. (*People v.Boyer*, *supra*, 48 Cal.3d at p. 267; Appen. pp. A-37-A-42.)

2. Respondent's statements were obtained in violation of his *Miranda* rights as he was in custody for *Miranda* purposes when he made incriminating statements. (*People v. Boyer*, *supra*, at p. 272; Appen. pp. A-52-A-53.)

3. Respondent's spontaneous statements made as Lewis was leaving the room were not voluntary, but were obtained in violation of *Miranda*. (*People v. Boyer*, *supra*, at p. 274; Appen. p. A-59.)

4. The testimony of Kennedy, evidence obtained by reason of a search of the El Monte residence, and the discovery of the

wallet did not have to be suppressed. (*People v. Boyer, supra*, 48 Cal.3d at pp. 275-279; Appen. pp. A-64-A-75.)

5. Respondent's trial testimony was the fruit of the police illegality. (*People v. Boyer, supra*, at p. 280; Appen. pp. A-79-A-80.)

6. The remaining admissible evidence against respondent did not make admission of the illegally seized evidence harmless beyond a reasonable doubt. (*People v. Boyer, supra*, at pp. 279-280; Appen. pp. A-76-A-80.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the Orange County, California, Superior Court, respondent moved to suppress evidence on the ground he was improperly seized within the meaning of the Fourth Amendment and his statements were the fruit of the unlawful seizure. He also argued his statements were

obtained in violation of his rights under *Miranda v. Arizona*, *supra*, 384 U.S. 436. The trial court denied the motions to suppress evidence on these grounds. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 256; Appen. pp. A-2-A-3.)

The California Supreme Court concluded respondent had been improperly seized within the meaning of the Fourth Amendment when contacted by the police and when he went to the police station since the police did not have a warrant or probable cause. The court also concluded respondent's statements were the fruit of this unlawful conduct. (*People v. Boyer*, *supra*, at pp. 267-270; Appen. pp. A-37-A-46.) In reaching this conclusion the court rejected petitioner's contentions that the encounter between the police and respondent was consensual and not a detention. It also rejected petitioner's argument respondent's

statements were volunteered and not the fruit of any police illegality. (*People v. Boyer, supra*, 48 Cal.3d at pp. 267-270; Appen. pp. A-37-A-46.)

The court also concluded respondent's statements were obtained in violation of *Miranda v. Arizona, supra*, 384 U.S. 436, as his statements after he invoked his *Miranda* rights were not volunteered, but were the fruit of police interrogation techniques. (*Edwards v. Arizona* (1981) 451 U.S. 477; *Oregon v. Bradshaw* (1983) 462 U.S. 1039; *People v. Boyer, supra*, at pp. 272-275; Appen. pp. A-46-A-63.) In reaching this conclusion the court again rejected petitioner's contention respondent's statements had not been obtained in violation of *Miranda* as petitioner was not in custody for *Miranda* purposes and these statements were volunteered. (*People v. Boyer, supra*, at pp. 271-275; Appen. pp. A-46-A-63.)

Based on these conclusions the court reversed the judgment in its entirety. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 256.)

Justices Panelli and Kaufman dissented from both holdings, concluding the majority had applied a subjective, rather than objective test, in determining respondent's Fourth Amendment rights were violated. These two justices also concluded respondent's *Miranda* rights had not been violated. (*People v. Boyer*, *supra*, at pp. 280-283; Appen. pp. A-81-A-90.)

Petitioner filed a petition for rehearing asserting that application of an objective, and not a subjective test, for determining whether there had been a seizure would lead to the conclusion respondent had been properly seized within the meaning of the Fourth Amendment. It

was also argued respondent's statements were not the fruit of any illegality.

Petitioner further argued respondent's statements had not been obtained in violation of *Miranda*. Rather, they were admissible as they were obtained after respondent invoked his rights, but then initiated further discussions with the police about the case. (*Edwards v. Arizona*, *supra*, 451 U.S. 477; *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039.)

The petition for rehearing was denied on these grounds although the opinion was modified on other grounds. (See Appen. B pp. B-1-B-5.)

REASONS FOR GRANTING THE WRIT

I.

THE SUBJECTIVE BELIEFS OF AN INDIVIDUAL CONTACTED BY THE POLICE HAVE NO BEARING ON WHETHER THAT INDIVIDUAL WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT OR WHETHER HIS STATEMENTS WERE THE FRUIT OF ANY POLICE MISCONDUCT.

First, certiorari should be granted as this case raises an important question whether the subjective beliefs of an individual seized by law enforcement can render contact with law enforcement a seizure within the meaning of the Fourth Amendment.

Respondent's statements were suppressed on Fourth Amendment grounds as the California Supreme Court concluded the statements were obtained as a fruit of an unlawful seizure. However, as the dissent points out, the holding was not based on whether respondent had been seized for Fourth Amendment purposes in an objective sense, but was based on an evaluation of

respondent's state of mind during interrogation as he countered police questions rather than the objective facts. (*People v. Boyer, supra*, 48 Cal.3d at pp. 280-281 [Panelli J., dissenting]; Appen. pp. A-81-A-90.)

This case, thus, raises an important question as this Court has never expressly considered whether the subjective beliefs of a person contacted by the police may turn that contact into a seizure under the Fourth Amendment. Indeed, decisions of this Court on closely related facts have indicated the subjective beliefs of the person contacted have no bearing on whether a police contact is a seizure. Rather, the facts must be analyzed in an objective sense. Thus, the conclusion reached by the California Supreme Court here was erroneous.

In *Scott v. United States* (1978) 436 U.S. 128, 137-138, it was observed that

the fact the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for his action does not invalidate that action as long as the circumstances, viewed objectively, justify that action. (*Scott v. United States, supra*, 436 U.S. at p. 138.)

More recently, in *Brower v. County of Inyo* (1989) ___ U.S. ___, 103 L.Ed.2d 628, a case involving a lawsuit under 42 U.S.C. 1983, petitioners claimed respondents violated *Brower's* Fourth Amendment rights by using excessive force. This occurred when police set up a road block which resulted in *Brower* having a fatal collision. This Court concluded there was a seizure within the meaning of the Fourth Amendment, but concluded the intent or state of mind of the police was not an issue in determining whether there was a

seizure. (*Brower v. County of Inyo, supra*, ___ U.S. ___, 103 L.Ed.2d at p. 636.) Moreover, Justice Stevens, concurring, noted the lead opinion comported with the recent trend in cases of this Court indicating whether there was a seizure does not turn on the subjective intent of the officer. (*Id.*, at p. 638 [Stevens J., concurring].)

On May 15, 1989, this Court decided *Graham v. Connor* (1989) ___ U.S. ___, 57 U.S.L.W. 4513 (87-6571), which further supports this proposition. In *Graham* it was noted that:

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (See, *Scott v. United States*, 436 U.S. 128,137-139 (1978); see also, *Terry v. Ohio, supra*, at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard.")."

It is true that this Court has observed that a person is seized when there is an official show of authority such that a reasonable person would have believed that he was not free to leave. (*Florida v. Royer* (1983) 460 U.S. 491, 501-502; *United States v. Mendenhall* (1980) 446 U.S. 544, 554-555 [Stewart J., concurring]; see too, *Florida v. Rodriguez* (1984) 465 U.S. 1, 5-6; *INS v. Delgado* (1984) 46 U.S. 210, 215-216). However, this does not connote a subjective standard is to be applied. Rather, it has been observed that use of the reasonable man standard by this Court was not designed so the question of whether a defendant had been unlawfully seized could hinge on the defendant's state of mind. Rather, it was to hinge on objective indices that would permit a fair determination of whether a seizure had

occurred. (See e.g., *United States v. Burrell* (D.C. App. 1972) 286 A.2d 845; La Fave, *Search and Seizure* [2nd. Ed. 1987], section 5.1(a), pp. 388-389.

As LaFave observes:

"Secondly, the question is not how the particular suspect subjectively perceived the situation, for the test is stated in objective 'reasonable man' terms. Of course, a given set of circumstances might operate quite differently upon a person with a 'guilty mind' as compared to an 'innocent person.' That being so, perhaps the seizure standard could be more accurately stated, as some lower courts have done, in terms of a 'reasonable person, innocent of any crime.' But, in any event, it is of great practical significance that the constitutional test for determining whether a seizure occurred is expressed in objective rather than subjective terms. Were it otherwise, the issue would 'be determined by swearing contests in which officers regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them.'" (Emphasis in original.)

Similarly, Justice White in his dissenting opinion in *United States v. Mendenhall, supra*, 446 U.S. at page 570, notes that:

"Moreover, although Mr. Justice Stewart's opinion purports to make its 'seizure' finding turn on objective factors known to the person accosted, in distinguishing prior decisions holding that investigatory stops constitute 'seizures,' it does not rely on differences in the extent to which persons accosted could reasonably believe that they were free to leave." (Footnote omitted; emphasis added.)

Thus, this case presents an important vehicle for this Court to clarify that the subjective beliefs of the individual contacted by the police have no place in the Fourth Amendment analysis of whether a seizure has occurred.

Application of an objective test here reveals the respondent was not seized and his statements were not the fruit of any unlawful seizure.

First, as the trial court found, the manner and circumstances of respondent's

transportation to the police station confirm the police relied on his consent to transport him to the station for questioning. The facts show respondent was initially approached by plainclothes officers in unmarked cars. Respondent requested and was given permission to take his girlfriend with him to the station. She did not go with respondent, but was told he would be gone about three hours, which included two hours travel time. Moreover, he was alone in the backseat when transported and was not handcuffed or otherwise overtly restrained. The doors of the vehicle were unlocked during transport. He was also placed in a room used for custodial as well as non-custodial interrogation.

Moreover, while the interrogation was somewhat accusatory, there is no evidence respondent remained in the room involuntarily or involuntarily continued

to respond to the interrogation. Moreover, when respondent stated he wanted an attorney and wanted to terminate the interview, it stopped. (See, *People v. Boyer, supra*, 48 Cal.3d at pp. 280-283 [Panelli J, dissenting]; Appen. pp. A-81-A-90.)

Moreover, as Justice Panelli points out in his dissent, respondent had prior experience with law enforcement officials in several incidents of arrest or detention. "Whatever he may have feared concerning his status during the interrogation, he could not have reasonably believed, in the period following the cessation of the interrogation, that he was being, or would be detained." (*People v. Boyer, supra*, at p. 283.; Appen. A-88-A-89.))

Thus, had the California Supreme Court applied the objective, rather than subjective standard, as mandated by

decisions of this Court and not examined the contact between respondent and the police in terms of respondent's state of mind, it would have found there was no seizure here contrary to the Fourth Amendment.

Indeed, application of the subjective test carried over to the court's analysis of whether respondent's statements were the fruit of unlawful police conduct. Had the court applied an objective standard it would also have concluded his statements were not the fruit of unlawful police conduct.

Statements obtained after an unlawful seizure need not be suppressed where there are intervening events that break the casual connection between an illegal seizure and the statements so the statements are sufficiently an act of free

will to purge the primary taint. (*Taylor v. Alabama* (1982) 457 U.S. 687, 690; *Brown v. Illinois* (1975) 422 U.S. 590.)

As noted, respondent had prior dealings with the police. Moreover, after questioning had ceased, he consented to a search of the El Monte residence. He was asked for and agreed to have fingerprints taken for elimination purposes. Moreover, there was a break of 25 minutes between questioning and his statements while he was taken to the jail, fingerprinted, and returned to the jail. Thereafter, he was advised he could not be questioned further. Lewis also made statements indicating respondent was not the sole focus of the investigation and suggesting he was about to be released. At this point, as the officer was about to leave, respondent blurted out his incriminating statements. (*People v. Boyer, supra*, 48 Cal.3d at p. 283; Appen. pp. A-35-A-36.)

All these facts point to the unmistakable conclusion respondent's statements were not the fruit of incessant police investigation, but were volunteered statements that were not the fruit of any prior illegal action.

Application of an objective standard instead of an analysis of the subjective state of mind of respondent would have reached this conclusion as well. Thus, certiorari should be granted to clarify that the subjective state of mind of the suspect does not furnish a basis for Fourth Amendment analysis.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE SCOPE OF THE DECISION OF THIS COURT IN *EDWARDS V. ARIZONA* (1981) 451 U.S. 477, CONCERNING WHEN A SUSPECT INITIATES A CONVERSATION AFTER INVOKING HIS *MIRANDA* RIGHTS.

Certiorari should also be granted to clarify the scope of the decision of this Court in *Edwards v. Arizona*, *supra*, 451 U.S. 477, as to what constitutes initiation of a conversation with police after an individual has invoked his *Miranda* rights.

In *Edwards v. Arizona*, *supra*, 451 U.S. 477, the defendant voluntarily submitted to questioning and later stated he wished an attorney before the discussions continued. The following day the detectives confronted the defendant in the county jail, and when he refused to speak, he was told that he had to talk. This Court concluded the statements had to be suppressed. Once an accused has

invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel is made available unless he initiates further communication, exchanges, or conversation with the police. Thus, *Edwards* precludes police from attempting to interrogate a suspect once he has invoked his right to counsel. An accused's statement after an invocation is only admissible if he initiates the conversation with the police. (Accord, *Arizona v. Robertson* (1988) ___ U.S. ___, 100 L.Ed. 2d 704, 717.)

The California Supreme Court, however, defined the term initiates in a very narrow manner and, relying on *Edwards* and its progeny, suppressed respondent's statements although they were volunteered.

Thus, certiorari should be granted to clarify what the scope of an initiated conversation is under *Edwards*.

The case of *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039, is of prime importance for defining what the term initiates means. There the defendant was questioned and invoked his right to counsel. Thereafter, the defendant asked what was going to happen to him, the officer indicated the defendant did not have to speak to him and the defendant indicated he understood. After further discussion, the defendant agreed to a polygraph which he took after another reading of his *Miranda* rights. When the examiner indicated he did not believe the defendant, the defendant made several incriminating admissions.

A plurality of this Court noted that when the defendant asked what would happen to him next, he initiated a conversation with the police. The only remaining question then was whether, in light of all the circumstances, he thereafter made a

knowing and intelligent waiver of his right to counsel.

The lead opinion in *Bradshaw* was written by Justice Rehnquist and joined in by then Chief Justice Burger, and Justices White and O'Connor. Thus, it was only a plurality opinion. Justice Powell in a separate opinion concurred only in the result. (*Oregon v. Bradshaw*, *supra*, 472 U.S. at 1047.)

Justice Powell in his concurring opinion pointed out there was a disagreement in the court as to whether *Edwards* announced a new per se rule. He hoped, however, that *Bradshaw* would resolve the question. Unfortunately, he lamented, it did not do so as evidenced by the different readings of *Edwards* by Justice Rehnquist and Justice Marshall in his dissent which was joined in by

Justices Blackmun, Brennan, and Stevens. (*Oregon v. Bradshaw*, *supra*, at pp. 1048-1049.)

Although some of the questions left open in *Bradshaw* were resolved in *Solem v. Stumes* (1984) 465 U.S. 638, the question of what constitutes initiation of conversation by an individual after an invocation of *Miranda* rights still has not been clarified. (See e.g., *Solem v. Stumes*, *supra*, [Powell J., concurring] at p. 652 fn. 1; *Michigan v. Jackson* (1986) 475 U.S. 625, 638 [Rehnquist J., dissenting].)

The instant case thus gives this Court a prime vehicle for resolving the scope of initiated conversation under *Edwards*.

The record here shows respondent had been fingerprinted for elimination purposes after he had invoked his rights. He was expressly told by Lewis that since

he had invoked his rights, Lewis was not going to speak with him any further and was not going to solicit any statements from him. Lewis then gave respondent some information about the case, told him he would be checking further, and began to leave to arrange transportation for respondent. Respondent had made no incriminating statements up to that point, but then suddenly said, "Hey, wait a minute. Come back here and sit down. You are right. I can't live with it. I did it. I didn't mean to do it, but I did it." (*People v.Boyer*, *supra*, 48 Cal.3d at p. 207; Appen. p. A-36.)

It is clear these statements were volunteered and not the fruit of direct interrogation as in *Edwards*. Thus, nothing in *Edwards* indicates these statements are inadmissible.

Moreover, under the opinion of Justice Rehnquist in *Bradshaw* the comments

of respondent clearly evidenced willingness for a generalized discussion about the investigation. (*Oregon v. Bradshaw, supra*, 462 U.S. at pp. 1045-1046, 1048 [Powell J., concurring]). Indeed, the comments here clearly constitute an attempt to initiate a conversation even under Justice Marshall's narrower view of initiation in *Bradshaw* which is a desire to communicate about the subject matter of the investigation. (*Id.*, at 1048 [Powell J., concurring].)

Thus, certiorari should be granted in this case to clarify the scope of an initiated conversation as discussed in *Bradshaw*. Indeed, clarification is needed as evidenced by the fact the California Supreme Court declined to find respondent initiated a conversation after invoking his rights although it is clear even under Justice Marshall's discussion in *Bradshaw*

that respondent had initiated a conversation.

Bradshaw should thus be clarified so that volunteered statements as in this case after an invocation are not rendered inadmissible.

Indeed, it is clear respondent was the one who initiated further questioning by blurting out the remarks. Moreover, Lewis was not questioning respondent at that point and nothing indicates he was trying to elicit statements from respondent. Rather, he was about to let respondent go and was simply informing respondent of the state of the investigation.

The *Bradshaw* opinion does require a showing respondent waived his right to counsel at this point. The record here shows respondent was fully advised of his *Miranda* rights, expressed a desire to waive them despite his earlier invocation,

and then freely and voluntarily spoke with the police. Thus, his statements were clearly admissible under *Edwards* and *Bradshaw*.

The California Supreme Court, relying on *Rhode Island v. Innis* (1980) 446 U.S. 291, also concluded Lewis' conduct was tantamount to an interrogation and thus respondent's admissions were not admissible under the *Edwards* rule. (*People v. Boyer, supra*, 48 Cal.3d at p. 275.)

However, *Edwards* does not apply to implied interrogation, but to express interrogation. Moreover, under *Bradshaw*, since respondent initiated the further questioning by his outburst, the issue was whether his subsequent *Miranda* waiver was voluntary.

Moreover, even if *Rhode Island v. Innis, supra*, is applicable to this situation, there is no evidence

that Lewis' conduct was designed to elicit statements from respondent.

As Justice Panelli noted in his dissent, after respondent invoked his rights, no questioning took place over the next 30 minutes, respondent was told he could not be questioned further, and was told he was no longer the sole focus of the investigation. As the officer turned to leave the room, respondent called him back and blurted out the incriminating statement concerning his involvement in the killings. (See, *People v. Boyer, supra*, 48 Cal.3d at p. 282; Appen. pp. A-86-A-87.)

Thus, it is clear this case presents a prime example of initiated conversation under the rule announced in *Edwards* and *Bradshaw*. Certiorari thus should be granted to clarify the scope of initiated conversation as discussed in *Edwards* and *Bradshaw*.

CONCLUSION

Therefore, the petition for writ of certiorari should be granted to consider the important issues raised by this case.

DATED: June 26, 1989.

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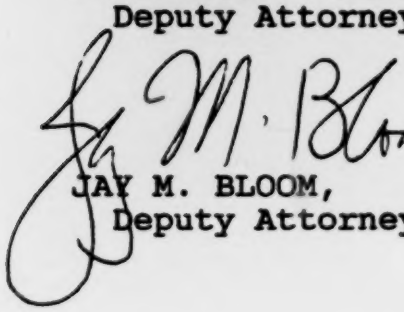

JAY M. BLOOM,
Deputy Attorney General

JMB:bjr
89US0003

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

State of California (Petitioner or Appellant) vs. Richard Delmer Boyer (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for ~~People of the State of California (Dept. of Justice/Office of the Attorney General)~~
(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Jay M. Bloom

(Type or print) Name Jay M. Bloom

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

AFFIDAVIT OF SERVICE BY MAIL

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No:
October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

RICHARD DELMER BOYER

v.

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Petition for Writ of Certiorari as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

California Supreme Court
Robert Wandruff, Clerk
350 McAllister Street, Room 4250
San Francisco, California 94102

Barbara Caulfield, Attorney
Brobeck, Phleger & Harrison
One Market Plaza, Spear Street Tower
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Ed Freeman, Deputy District Attorney
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P.O. Box 808
Santa Ana, CA 92701

Gary Granville, Clerk
Orange Co. Superior Court
For: Hon. James Turner
700 Civic Ctr. Dr., W.
Santa Ana, CA 92701

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 10 day of July, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 10, 1989.

Barbara Renfrow
BARBARA RENFROW

Subscribed and sworn to before me
this 10th day of July, 1989.

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Jean M. Burns
Notary Public in and for said County and State